No. 15.

Brief of Atty. Gen. (Pratt) for U.

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In the Supreme Court of the United States.

OCTOBER TERM, 1879.

CHARLES UHLFELDER, AS ANCILLARY executor of the last will and testament of Raphael Madrazo, deceased, plaintiff in error,
v.
THE UNITED STATES.

No. 15.

BRIEF FOR THE UNITED STATES.

LOUIS A. PRATT,
Assistant Attorney-General.

In the Supreme Court of the United States.

CHARLES COUDERT, AS ANCILLARY executor of the last will and testament of Raphael Madrazo, deceased, plaintiff in error,
v.
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BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The substantial facts set forth in the Findings of Fact herein are these:

Pending the proceedings in the district court of the United States which followed the seizure of the vessel of the decedent as an alleged blockade runner and in obedience to the order of that court, the United States marshal sold the vessel and her cargo and, pursuant to a regulation of the Treasury Department then in force, deposited the net proceeds of such sale, amounting to $10,359.20, in a national bank, which was a special or designated depository of public moneys of the United States, to await the further order of the court.

In the said proceedings the district court pronounced the seizure unlawful and decreed restitution to the decedent, by virtue of which he became entitled to receive said deposit, as representing and standing in the place of the said vessel and her cargo.

That decree was affirmed on appeal by this court and its mandate issued to carry the same into effect, by force of which the decedent again became entitled to receive the said deposit; but owing to the insolvency of the bank in which said deposit had been made, occurring pending said appeal, the bank was unable to return said deposit, and thus refused to comply with the said judgment or decree of restitution.

A receiver was duly appointed for the bank who thereafter declared several dividends upon the deposits of the bank at the time of its insolvency and failure, including the said deposit of the proceeds of the sale of the said vessel and cargo, and who paid upon account of such proceeds to the decedent, or his personal representative after his death, in various amounts, from May 1, 1871, to September 28, 1882, the sum of $8,183.77, leaving a balance of $2,175.43, no part of which the said receiver was thereafter able to pay.

And claim is made in this action for the above balance, with interest on the same from the date of the last payment made by the receiver of the insolvent bank, as above set forth.

Judgment was rendered for the claimant for the entire claim in the circuit court, but this judgment was reversed by the circuit court of appeals.

ARGUMENT.

The claimant contends, upon the foregoing facts, that the proceeds of the sale of the vessel and cargo of the decedent were held in the Treasury of the United States in trust for the claimant, and that the United States is therefore liable to the claimant for the unpaid balance of said proceeds with interest as an incident.

The court below disposed of this contention by holding that the proceeds of said sale were not deposited in the Treasury of the United States and that the Government was not responsible for its diminution, pointing out in this connection that the vessel and her cargo were sold by order of the district court and that the proceeds of such sale remained subject to the order of the court in lieu of the vessel and cargo.

In so holding the court planted itself squarely upon the decision of this court in *Branch* v. *United States.* (100 U. S., 673.)

Counsel for claimant insist, however, that the Branch Case is not analogous to this; but the distinction made by them would seem to be in matters of detail only, the essential facts remaining the same in both cases.

In both cases the property of claimant was seized by the United States and made the subject of condemnation proceedings; in both the property seized was sold by order of the court in which those proceedings were had, and deposited in a bank which was a special depository of the United States to await the order of the court; in both the depository failed pending the proceedings and

was unable to pay the full amount of the deposit. Upon this state of facts this court held in the Branch Case (*supra*):

> In this case the money deposited belonged for the time being to the court and was held as a trust fund pending the litigation. The United States claimed it, but their claim was contested. So long as this contest remained undecided the officers of the Treasury could not control the fund. Although deposited with a bank that was a designated depository, it was not paid into the Treasury. No one could withdraw it except the court or the clerk, and it was held for the benefit of whomsoever in the end it should be found to belong.

It may be that, as earnestly contended by counsel for claimant, it was the duty of the marshal who sold the vessel under consideration to deposit the proceeds in the Treasury of the United States, but it does not appear from the Findings of Fact in this case that such was his action. And the Findings of Fact must govern.

Moreover, if any trust relation toward the claimant was assumed by the United States with respect to this deposit, the proof of such relation must be looked for in the facts and circumstances surrounding the deposit, and especially the acts of the parties in this connection, for there was clearly no express trust created, nor assumed by the United States. But these facts and circumstances indicate that the deposit made was regarded in the light of "money belonging for the time being to the court and held as a trust fund pending the litigation," precisely as in the Branch Case.

Turning to the Findings of Fact, it appears that while the appeal to this court in the case of the *Teresita* was pending, the bank in which the deposit of the proceeds of the sale had been made became insolvent and was placed in the hands of a receiver. As a result, after the mandate of this court had been issued to carry into effect the decree of restitution made by the district court, by force whereof the decedent became again entitled to receive the said deposit, owing to the insolvency and pending litigation the said bank was unable to return the said deposit, and thus refused to comply with the said judgment or decree of restitution. This was some time prior to December, 1866. Thereafter, beginning May 1, 1871, and ending September 28, 1882, the receiver of the bank paid to the claimant and to his representatives, after his death, various sums on account of this deposit, amounting to $8,133.77. (Findings 5, 6, and 7.)

It is fair to presume that these payments were so made upon the filing with the receiver, by the claimant, of his claim against the bank for the amount of the deposit *as one of the creditors of the bank.* At all events his acts with reference to this deposit during all that period of sixteen years are consistent only with the theory that he regarded the bank and not the United States as his debtor for the amount of the deposit and are essentially inconsistent with his present claim that the bank held this deposit as the agent of the United States in trust for his benefit. For in that event it is clear that he was entitled to payment in full of the amount of the deposit immediately upon the issuing of

the mandate of this court above referred to—a right which he would most assuredly have taken steps to speedily assert and enforce, rather than to await for years the uncertain results of the liquidation of the affairs of an insolvent bank.

That he did not then nor seasonably thereafter assert his claim against the United States (delaying such action until 1888), but only against the bank, treating the bank and not the United States as his debtor, ought to be sufficient to conclusively determine that the deposit was made precisely as defined in the Branch Case and to estop the claimant in his present claim.

At all events, these facts contain a complete answer to the eloquent and oft-repeated periods of counsel on the subject of "good faith." It must be remembered that the United States has not profited in this matter at the expense of the claimant, and if it must now pay the amount demanded by the claimant it must be at its own loss. But this loss will be fairly attributable to the action of the claimant.

If the claimant had seasonably asserted and succeeded in enforcing his claim against the United States after the bank had refused payment to him, it would have thereby been established that the bank held this deposit as the financial agent of the United States and not as the depository of the court, and the Government would then doubtless have been in a position to have collected from the bank, as a preferred creditor, or from its bondsmen, the full amount of the deposit. But the claimant permitted the affairs of the bank to be wound up and sixteen or, more accurately, twenty-two years to elapse before

giving any intimation that he looked to the United States and not to the bank for payment.

The imputation of bad faith may unquestionably be fairly made in this case, but not against the United States.

THE STATUTE OF LIMITATIONS.

If the court shall find that the distinction sought to be made by claimant between the facts in the Branch Case and in this is substantial, and that the deposit made by the marshal was in effect in the Treasury of the United States, and was thus held in trust by the United States, then the law relating to trust funds undoubtedly became applicable to this fund as urged by the claimant and there remains on behalf of the United States only the inquiry as to when, if at all, this trust was disavowed.

The answer to this inquiry is to be found, it seems to me, in the Findings of Fact.

As already cited, after the claimant became finally entitled to receive the deposit made in the bank on the mandate of this court, "owing to the insolvency and pending litigation, the said bank was unable to return the said deposit, and thus refused to comply with the said judgment or decree of restitution."

This refusal to comply with the decree of restitution of the court was a disavowal of the trust on the part of the United States sufficient to give the claimant a right of action against the United States, for the contention of the claimant is that the bank was the agent of the United States—in effect its Treasury—holding the deposit in trust for the benefit of the claimant. Hence when the bank refused, for whatever reason, to

comply with the order of the court by paying the deposit to the claimant, its refusal became the act of the United States.

Up to the time of this refusal he had no occasion to sue, but the refusal gave him the right to sue and, by the same token, the statute of limitations began then to run against that right and had barred it at the time this action was commenced. (*United States* v. *Wardwell*, 172 U. S., 53.)

AS TO INTEREST.

I can scarcely regard as serious the argument attempted by counsel for claimant to sustain his claim for interest in this action. Counsel are acquainted with and correctly state the law upon the subject on page 27 of their brief. I fail to see that they have brought their claim within any of the recognized *exceptions* to the rule cited by them from the decisions of this court.

As for the argument that the "Tucker Act" amounts to a repeal of the "former statutory system against the allowance of interest as an element of damages" (whatever that may mean), it seems too fanciful for consideration.

The claimant demands payment from the United States of the unpaid balance of an alleged trust fund held for his benefit by the United States, and also of interest, pure and simple, upon this unpaid balance. It may be that he is entitled to the principal sum claimed, but interest he certainly can not have.

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